CURRENT LEGISLATION

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THE SHIP MORTGAGE ACT, 1920.—The Ship Mortgage Act, 1920, which has been incorporated in the Merchant Marine Act, 1920,[1] is a vital step in the much heralded development of a privately owned American Merchant Marine, and presents a question of constitutional validity which bids fair to be keenly fought. The Act gives priority to a vessel mortgage in foreclosure proceedings over all maritime liens against a vessel, except liens arising out of tort, for wages of stevedores or crew, for general average, and for salvage. Jurisdiction is conferred upon federal district courts to foreclose a vessel mortgage by a suit *in rem* in admiralty. The preferred status is created by recording the mortgage as a preferred mortgage and endorsing this fact on the documents of the vessel. Ready access to these documents is required to be given to all having business which would give rise to a lien. This simple, direct remedy of a libel *in rem* in admiralty is something hitherto denied by the Supreme Court to a mortgagee, who has had to seek his usual remedies in equity.[2]

The purpose of the Act is two-fold: (1) to render investment in ships more attractive at a time when trust companies are reluctant to take bonds on ships, and (2) better to protect the government in its sale of its huge stock of bottoms on the installment plan.[3] To accomplish these results the vessel mortgagee is given a lien outranking in priority all others, with the exceptions previously set out. The reason for the latter is that liens arising out of maritime torts in general, or general average and salvage, can be guarded against by insurance, and if the mortgagee knows that insurance is provided against all liens superior to his own, he has ample protection.[4] The vessel mortgage is, however, preferred to liens for repairs and supplies, and it is from the ship repairing and supply organizations that chief opposition to the Act has emanated.[5] The answer to their objection seems to be that the repair and supply man has ready access to the certificates of registry of the vessel[6] and can easily ascertain how valuable his lien will be in its subordinated position. It appears indisputable, however,

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[1]H. R. 10378, approved June 5, 1920, Public No. 261, 66th Cong., 2nd Sess.

[2]Bogart et al. *v.* The John Jay (1854) 58 U. S. 399. "A mortgage has nothing in it analogous to those contracts which are the subjects of admiralty jurisdiction. . . . Where there has been a failure to pay . . . (the mortgagee) must resort either to a court of equity or to statutory remedies. . ." Per Wayne, J. at p. 402.

[3]Statement of Ira Campbell, former admiralty counsel to the U. S. Shipping Board at Hearing of House Committee on Merchant Marine and Fisheries on H. R. 8422, August 27, 1919, p. 4.

[4]Hearing of Committee on Commerce, U. S. Senate, February 5, 1920, p. 968.

[5]Hearing of House Committee on Merchant Marine and Fisheries on H. R. 8873, rev. H. R. 8422, Part III, September 11, 1919, pp. 99-110.

[6]Merchant Marine Act, 1920, § 30, subs. E.

that these men will henceforth, because of insufficient security, be unable to undertake some business which they otherwise might have safely accepted. It will be noted that the Act leaves the mortgage lien still subordinated to liens for wages of stevedores and crew,[7] and against these there is no insurance. It has been urged, further, that the Act will impede the operation of the vessel, particularly in foreign ports, by rendering impracticable the use of the bottom as a basis for credit for the purchase of supplies or repairs.[8] Its supporters see no difficulty, in this day of telegraphic communication, in the way of speedily procuring funds from the owner to supplement the insufficient security of the vessel itself;[9] further, repairs done in foreign ports are largely necessitated by accidents which are covered by insurance.

The Act as passed differs from the proposed bills[10] that preceded it chiefly in giving the mortgagee the important power to foreclose by a libel *in rem* in admiralty, instead of a suit *in rem* in equity with simulated admiralty proceedings. It is on this point that the constitutional issue is raised.[11] The power of Congress to vest the federal district courts with adequate jurisdiction is found rather in the constitutional grant of admiralty and maritime jurisdiction,[12] coupled with the "necessary and proper" clause,[13] than in the commerce power.[14] In the light of these constitutional provisions it follows that the paramount power to regulate the maritime law of the country is vested in Congress.[15] By Section 9 of the Judiciary Act of 1789[16] the federal district courts were given "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction", retaining to the suitor any existing common law remedies. Admitting, then, the power over contracts whose subject matter falls properly within the maritime field, there remains the problem of the power of Congress to say that a vessel mortgage is a contract within that category.

The jurisdiction of a court of admiralty is based upon equitable principles, yet it is lacking in those powers peculiar to an equity court.

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[7]Merchant Marine Act, 1920, § 30, subs. M (b) (1). This seems only just to these helpless workers.

[8]See report of Committee on Admiralty and Maritime Law (1920) 6 Journal Am. Bar Ass'n, 416.

[9]Hearing of House Committee on Merchant Marine and Fisheries on H. R. 9419, rev. H. R. 8422 and H. R. 8813, Part V, February 6, 1920, p. 60.

[10]H. R. 8422, H. R. 8873, H. R. 9419, 66th Cong., 2nd Sess.

[11]Report of Committee on Admiralty and Maritime Law, *supra*, footnote 9.

[12]U. S. Const., Art III, § 2; "The Judicial power shall extend . . . to all cases of admiralty and maritime jurisdictions."

[13]U. S. Const., Art. I, § 8: "The Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

[14]U. S. Const., Art. I, § 8: "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

[15]Butler *v.* Boston Steamship Co. (1888) 130 U. S. 527, 556, 9 Sup. Ct. 612; Southern Pac. Co. *v.* Jensen (1916) 244 U. S. 205, 215, 37 Sup. Ct. 524. But *cf.* (1920) 20 Columbia Law Rev. 685.

[16]1 Stat. 76, 77, § 9, now in (1917) 40 Stat. 395, U. S. Comp. Stat. (Supp. 1919), §§ 991 (3), 1233.

It cannot declare or enforce a trust or other fiduciary relationship[17] or entertain a libel for specific performance or to correct a mistake.[18] "The admiralty jurisdiction, in cases of contract, . . . is limited to contracts, claims, and services purely maritime".[19] A mortgage contract has been held to be non-maritime in character,[20] and it is argued that Congress cannot broaden the field of admiralty and maritime jurisdiction beyond the limits which the Supreme Court has set.[21]

And yet there appears to be a sound basis for sustaining the constitutionality of the Act. The holding of the *John Jay* case[22] was based solely on the law of England then existing. As the court pointed out, with the assistance of a statute,[23] English admiralty courts subsequently took cognizance of vessel contracts, so as to assimilate the English law to that of the continent. Did *The Lottowanna*[24] settle once for all that the extent of the maritime jurisdiction is an exclusively judicial problem?

The Steam-Boat Thomas Jefferson[25] held that courts of admiralty had no jurisdiction over contracts for seamen's hire where the services were not to be substantially on waters within the ebb and flow of the tide. The Act of February 26, 1845[26] purported to extend the jurisdiction of district courts to the Great Lakes and connecting navigable waters. In *The Propeller Genesee Chief* v. *Fitzhugh et al.*,[27] decided under the Act, the "arbitrary and (in this country) false test of navigable waters"[28] laid down in *The Thomas Jefferson* case was overruled. The Act was regarded, not as extending the admiralty jurisdiction of Congress to non-maritime fields, but simply as a distribution by Congress of an already existent admiralty jurisdiction.

An analogous situation was presented in the case of non-maritime torts and the statutory provisions for a shipowner's limitation of lia-

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[17]Ward *v.* Thompson (1859) 63 U. S. 330; Kellum *et al. v.* Emerson (C. C. 1854) 2 Curtis 79.

[18]Andrews *et al. v.* Essex, *etc.* Ins. Co. (C. C. 1822) 3 Mason 6, 16.

[19]Catron, J., in Peoples' Ferry Co. of Boston *v.* Beers *et al.* (1857) 61 U. S. 393, 401.

[20]Bogert *et al. v.* The John Jay, *supra,* footnote 2; see The Eclipse (1889) 135 U. S. 599, 10 Sup. Ct. 873.

[21]The Lottowanna (1874) 88 U. S. 558, 576. Bradley, J. in Butler *v.* Boston Steamship Co., *supra,* footnote 15, stated: "It is true, we have held that the boundaries and limits of the admiralty and maritime jurisdiction are matters of judicial cognizance and cannot be affected or controlled by legislation whether state or national". Citing The St. Lawrence (1861) 66 U. S. 522, 526, 527; The Lottowanna, *supra.*

[22]Supra, *footnote 2.*

[23]St. 3 & 4 Vic. (1840) c. 65.

[24]Supra, *footnote* 21.

[25](1828) 23 U. S. 428.

[26]5 Stat. 726.

[27](1851) 33 U. S. 443.

[28]Grier, J., in Jackson *et al. v.* Steamboat Magnolia (1851) 61 U. S. 296, 299. In this case, the district court of its own motion extended its jurisdiction to a case not covered by the statute, but analogous to it, i. e., fresh water connecting with the sea.

bility against them. In *The Plymouth*[29] a question involving a non-maritime tort was held to be beyond the cognizance of a federal district court sitting in admiralty. The Act of March 3, 1851[30] limited a shipowner's liability to his interest in the vessel and excluded debts and liabilities for non-maritime torts from the benefit of its provisions.[31] Then came the amendment of June 26, 1884,[32] which was construed by the Supreme Court to extend the limited liability of a shipowner to non-maritime torts.[33] By analogical reasoning from these two situations, may not the Supreme Court with equal propriety say that conferring jurisdiction upon courts of admiralty over vessel mortgages is merely a distribution of an already existent admiralty jurisdiction as to whose proper bounds the court has hitherto been mistaken?

The constitutional grant of admiralty jurisdiction is not self-executing, and it is for Congress to pass legislation distributing the already existing jurisdiction. Remembering the analogous precedents suggested, and the changed conditions and requirements of the time, it does not seem difficult for the Supreme Court to take the view that the original grant of this jurisdiction incorporated the continental practice that the foreclosure of a vessel mortgage was enforceable in admiralty.[34] This view does not place Congress in the role of opening the doors of admiralty to suitors with non-maritime claims.

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[29](1865) 70 U. S. 20. Accord, Cleveland Terminal Co. *v.* Steamship Co. (1907) 208 U. S. 316, 28 Sup. Ct. 414.

[30]9 Stat. 635, c. 43, U. S. Comp. Stat. (1916) § 8021.

[31]City of Norwich (1885) 118 U. S. 468, 6 Sup. Ct. 1150. See *Ex parte* Phenix Ins. Co. (1886) 118 U. S. 610, 7 Sup. Ct. 25, holding that since the tort committed was non-maritime, the fact that a petition was pending to obtain the benefits of the limitation could not operate to draw into the proceedings actions for a liability not affected by the statute.

[32]23 Stat. 57, c. 121, U. S. Comp. Stat. (1916) § 8028.

[33]Richardson *v.* Harmon (1911) 222 U. S. 96, 32 Sup. Ct. 27. It should be said that the question of constitutionality was not raised in this case, but Hazel, J. in The Steamdredge No. 6 (1915) 222 Fed. 576, 578, said: "I do not think there is any doubt of constitutional power to extend the act to non-maritime torts. I believe that a proper construction of Article 3, § 2 of the federal constitution, . . . includes the right of Congress to vest a court of admiralty with jurisdiction of injuries caused, without the priority or knowledge of the owner, by the negligence of the vessel or those having charge of her navigation."

[34]*Cf.* Borgnis *v.* Falk Co. (1911) 147 Wis. 327, 348, 133 N. W. 209.